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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1046

CASPER W. WEINBERGER, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,

Appellant,

v.

SANTIAGO DIAZ, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

OPINION BELOW

Appellees concur with Appellant that the official citation of the opinion of the district court is 361 F. Supp. 1 (S.D. Fla., 1973). Citation herein to the district

court opinion shall be as in Appellant's Brief to the Jurisdictional Statement; "(J.S. App.__)."

For the sake of simplicity, Appellees adopt the symbolic designations to the "Jurisdictional Statement" and to the "Appendix" (the latter jointly filed by the parties as a separately bound Appendix) contained in footnote "1" of Appellant's Brief at p. 1. Occasional references, however, will be made herein to matters not included in the separately bound Appendix, but which may be found in the original record ("R."), and in an Appendix attached to and bound together with this Brief (referred to as "App.").

JURISDICTION

Appellees agree with the gounds for Supreme Court jurisdiction set forth in Appellant's Brief at p. 2.

QUESTIONS PRESENTED

1. Whether one or both of the joint federal exclusionary statutory requirements that an alien be (1) lawfully admitted for permanent residence, and, (2) reside in the United States continuously for five years, in order to be eligible for the Supplementary Medical Insurance Program, 42 U.S.C. (Supp. II) §1395o(2)(B), otherwise available to all citizens solely upon reaching the age of 65, violates equal protection notions and/or the due process clause of the Fifth Amendment.

2. Should the court find one of the dual residency requirements to be constitutional, whether it is

severable from the other, thereby continuing its viability as a classification of aliens excluded from supplementary medical insurance benefits.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. Article I, Sec. 8, Cl. 4, of the Constitution of the United States provides:

> The Congress shall have power * * * [t]o establish a uniform Rule of Naturalization * * *.

2. The Fifth Amendment to the Constitution of the United States provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

3. Forty-Two U.S.C. (Supp. II) §1395o, provides:

> Every individual who,
>
> (1) is entitled to hospital insurance benefits under part A, or
>
> (2) has attained age 65 and is a resident of the United States, and is either (A) a citizen or (B) an alien lawfully admitted for permanent residence who has resided in the United States continuously during the 5 years immediately preceding the month in which he applies for enrollment under this part,
>
> is eligible to enroll in the (supplementary) insurance program established by this part (B).

STATEMENT OF THE CASE

Rather than adopt without reservation Appellant's "Statement," Appellees have chosen to set forth their own Statement of the Case which we believe will clarify the case and draw the issues to be decided by this Court more sharply than does the Appellant's Statement.

Appellees, Diaz and Clara, entered the United States on February 4, 1971 and July 8, 1971, respectively, as lawfully admitted Cuban parolees (A. 33-36), pursuant to the Attorney General's parole authority, 8 U.S.C. §1182(d)(5) (J.S.App. 17, n.5). On June 20, 1971, Appellee, Espinosa, was lawfully admitted to the United States for permanent residence (R.224).[1]

Appellees are all 65 years of age or older (A. 34-35; R. 214-215) and none of the Appellees has resided continuously in the United States for a period of 5 years (R.224).

On June 15, 1972, Appellees Diaz and Clara applied to the Department of Health, Education and Welfare for enrollment in the Supplementary Medical Insurance Program for the Aged under Part "B" of the Medicare

[1]Contrary to the assumption contained in the district court opinion (J.S. App. 14), and reasserted in Appellant's Statement at p. 3, that like Clara and Diaz, Appellee Espinosa is a Cuban national, the record does not reflect Espinosa's nationality (A. 18, 36; R.224). He is in fact a Columbian national who entered the United States from that country. In pointing out this error, Appellees do not intend to appear to be nit-picking, although it is conceded that the point may have little, if any, significance to the case. It does, however, establish the credibility of the class as recognized by the district court as including aliens other than Cubans.

Act (A.30), an insurance program that covers part of the cost of physicians services, home health care, diagnostic tests, and medical appliances. 42 U.S.C. §1395j, *et. seq.* The Part "B" program, which supplements the hospital insurance plan for the aged under Part "A" of the Medicare Act, is supported in part by monthly premiums paid by eligible individuals who choose to enroll. 42 U.S.C. §1395r(b). The Secretary denied the applications of Appellees, Diaz and Clara on August 4, 1972, for failure to meet the "lawfully admitted for permanent residence" and five year residency requirements applicable to aliens under 42 U.S.C. (Supp. II) §1395o(2)(B). On October 26, 1972 Appellee, Espinosa, applied for enrollment in Part "B" of the Medicare program. It was stipulated by the parties that his application would be denied since he had not resided continuously in the United States for a period of five years as required by 42 U.S.C. (Supp. II) §1395o(2)(B) notwithstanding the fact that, unlike Appellees Diaz and Clara, he met the other eligibility requirement of admission into the United States as a permanent resident. (R. 224-226).

On August 18, 1972 Diaz, later joined by Clara and Espinosa, instituted this action in the United States District Court for the Southern District of Florida on behalf of himself and all persons in the United States who have been or will be denied enrollment in the Medicare Part "B" Program by reason of their inability to meet the dual alien residency requirements of 42 U.S.C. (Supp. II) § 1395o(2)(B) (A. 17-20).

The complaint urged that the Court certify a class "of all persons in the United States who have been or will be denied enrollment" because of their inability to

meet both the permanent residency requirement and the 5 year durational residency requirement of the subject statute. The complaint further urged that a subclass be certified, represented by Espinosa, consisting of "all noncitizens in the United States who have attained permanent resident status" but who have been or will be denied enrollment solely due to their inability to meet the additional durational residency requirement of the same statute (A. 18-19).

A three judge district court was convened and held it had jurisdiction pursuant to 42 U.S.C. §405(g) (J.S. App. 14-16). The court then certified the suit as a class and subclass. However, because the named Appellees were not sufficiently representative of all aliens, it narrowed the definition of the class and subclass as proposed in the complaint from all aliens to "immigrants."[2]

[2] The use of the term "immigrant" to define the class and subclass by the district court is explained in the district court opinion (J.S. App. 20, n.8). Since Appellees have not cross-appealed nor otherwise questioned the class or subclass as defined by the district court, it is self-evident that the court's holding *applies only to the members of the recognized class and the challenged statute remains in effect as to aliens excluded from the recognized class.* Thus, the constitutionality *vel non* of the challenged statute as to the excluded aliens was not decided by the district court, is not before this Court, and remains an open question.

Despite the reformulation of the recognized class by the district court both the opinion of the district court and the Appellant's Brief, by and large, treat the class and subclass, for purposes of argument, as including all aliens in the United States who are unable to enroll in the Medicare Part "B" Program because of their inability to qualify for either one or both of the dual residency requirements. In this, the Appellees' Brief, we shall follow the same

The court held that 42 U.S.C. (Supp. II) §1395o(2)(B) is unconstitutional under the "equal protection notions inherent in the Fifth Amendment due process clause", insofar as it denies Medicare Part "B" benefits to "immigrant" aliens for failing to meet a durational residency requirement which is not imposed on United States citizens. (J.S. App. 33). The court also held that the requirement that an alien be "lawfully admitted for permanent residence" is not severable from the durational residency requirement as a matter of statutory construction and is therefore unenforceable (J.S. App. 33-38). The court further held (although unnecessarily in light of its previous formulation of the class as limited solely to "immigrants" (who by definition are not temporary residents of the United States)), that to the extent that the durational residency requirement represents a congressional judgment that aliens residing temporarily in the United States should not receive supplementary medical insurance coverage, the five year residency requirement creates an overly inclusive classification to accomplish that purpose (J.S. App. 30-32).

The court's judgment permanently enjoined the Secretary from enforcing the alien eligibility requirements of 42 U.S.C. (Supp. II) §1395o(2)(B) as to both the class and subclass (J.S. App. 39).

pattern, except to point out when the class as recognized by the lower court may affect the issues presented for decision. Obviously, if either or both of the dual residency requirements are held by this Court to be unconstitutional as to all aliens, they will likewise be unconstitutional as applied to the lesser included class of "immigrants" recognized by the district court.

The court in conclusion noted that, although unnecessary to its decision, it had considerable reservations as to the constitutionality of the permanent residence requirement. The only rational purpose perceived by the court for this requirement would be to screen out potential aliens likely to become public charges which would make it duplicative of other provisions of the Immigration and Nationality Act which have the same purpose. While this reason alone would probably be insufficient to declare it unconstitutional (although ineffective), when added to the overbreadth of the provision as a means of achieving the proposed legislative purpose, the court considered it of dubious constitutionality. This latter point was emphasized by the court by pointing out that after having declared the durational residency requirement unconstitutional, the requirement of a permanent residence status would "work a fundamental injustice in that a major part of the relief contemplated by this decision would thereby be rendered a nullity." *Diaz*, (J.S. App. 40). The court was referring to the thousands of Cuban parolees who cannot in practice achieve permanent residence status until they have resided in the United States for four years or more (J.S. App. 18-19, n.6).

ARGUMENT

Introduction and Summary

Appellant commences its brief by reference to the "unique status" theoretically enjoyed by both the alien

and the American Indian residing in this country, *Morton v. Mancari*, 42 U.S.L.W. 4933 (U.S. June 17, 1974). Appellant's Brief at p. 11. Unfortunately, the common characteristic suffered by these otherwise unrelated groups is that while "ordinary" citizens accept as inalienable the rights and benefits conferred by the Constitution, state and federal statutes, and customs, usages and practices of our nation, both the American Indian and the alien resident[3] alike have often had to fight their way into the "American" system. If anything, the advantage of holding dual "nationalities" while residing in the United States, is at best, a dubious one. Many United States resident-members of these groups have been made to suffer as "foreigners" in a new land, rather than partake in all the benefits and comforts enjoyed by ordinary citizens. Indeed, *Morton* gave constitutional sanction to preferential Indian employment legislation in what is obviously a judicial attempt (preceded by similar legislative efforts) to expiate the sins of the past visited upon American Indians, notwithstanding the resulting discriminatory effect it would have upon equally qualified members of the majority population.

Like the Indian, the alien residing permanently in the United States does not normally enjoy the dual comforts, pleasures, and protections that theoretically flow from dual nationality. He has come to these shores primarily for refuge, seeking surcease from political

[3]The term "alien resident" is used here, as it is throughout the brief, to distinguish between the alien whose expectations and understandings with the appropriate federal governmental authorities is that his status will be something closer to "permanent resident" than to that of a transient alien visitor to the United States. Cf., *Diaz*, (J.S. App. 35, n. 18). This point is further discussed, infra at Sec. II, pps. 38-43.

upheaval and persecution in his native land. Although initially looked upon with suspicion by his American neighbors, the United States has generally fulfilled its promise, enshrined at the base of the Statute of Liberty, by accepting and assimilating aliens as the "huddled masses yearning to breathe free." This country has traditionally offered sanctuary to the beleagured of other nations. The great immigrations of the late 19th and 20th centuries attest to this effort in international humanitarianism, and, in more recent days, the beckoning welcome to hundreds of thousands of Cuban refugees[4] escaping the ravages of totalitarian dictatorship in their native land confirm it.

It is these very individuals, many of whom are elderly and in need of medical attention otherwise beyond their financial reach[5] who compose a large part of the class adversely affected by the challenged provisions limiting Part "B" of the Medicare Program only to "permanent residents" who have resided in the United States continuously for five years. Cf., 111 Cong. Rec. 15,934, comments of Sen. Inouye.

The district court, while expressing doubts as to the constitutionality of the permanent residency require-

[4] Cuban Refugee Program Fact Sheet (HEW, March, 1974), (A. 40).

[5] Although Medicare is not limited solely to the poor or to the indigent, clearly it is this class of citizens and aliens which has the greatest need for its benefits. After all, it is the public contribution through general revenue funds which makes expensive medical services available to those who otherwise could not afford to pay for them. It is nevertheless to be observed that *all* enrolees, including the indigent, pay monthly premiums in order to contribute to the full solvency of the program. *Diaz v. Weinberger*, (J.S. App. 27).

ment, *Diaz*, (J.S. App. 39-40), found it unnecessary to reach that issue in light of its prior holding declaring the durational residency requirement unconstitutional *and* nonseverable from the resident alien provision, thereby causing the dual residency provisions to fall together. The Appellees, in this brief, while fully agreeing and adopting by reference, the "non-separability" holding of the district court, take the further position of challenging both the permanent residency requirement and the durational residency[6] requirement as concurrently violative of due process and equal protection notions of the Fifth Amendment. We are compelled to make this argument not only for the reasons suggested by the district court [Diaz, (J.S. App. 39-40)], but because we can find no sound constitutional justification for upholding the "permanent residency requirement" while at the same time striking down as unconstitutional its durational residency counterpart. Thus, our arguments contained hereinbelow, except when expressly noted, should be

[6] Short-term durational residency periods which have been approved by this Court in voter or election cases for the purposes of allowing time for administration and to avoid fraud are unlike the residency requirements under challenge in the instant case. In voter cases the issue of the location of actual residence of the voter is tied directly to the right to vote in a particular voting district. Thus, the state has a rational and, indeed compelling governmental interest, in requiring a short durational period of residence. *Marston v. Lewis*, 410 U.S. 679 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972). The residency requirements of the supplemental insurance program are unrelated to the reasons for "proof of residence" in the voting cases. Indeed, they are totally unrelated to the purposes of the medical insurance program. Cf., *Memorial Hospital v. Maricopa County*, 42 U.S.L.W., 4277, 4280-4281 n.15 (U.S. Feb. 26, 1974).

treated as applying to *both* the "lawfully admitted for permanent residence" and the five-year durational residency requirement contained in 42 U.S.C. (Supp. II) §1395o(2)(B).

ARGUMENT

I.

THERE IS NO RATIONAL BASIS NOR COMPELLING GOVERNMENTAL INTEREST IN DENYING LAWFULLY ADMITTED ALIENS THE RIGHT TO ENROLL IN THE SUPPLEMENTAL MEDICAL INSURANCE PLAN FOR THE ELDERLY AND THUS, BOTH THE PERMANENT RESIDENCY REQUIREMENT AND THE FIVE YEAR DURATIONAL RESIDENCY REQUIREMENT VIOLATE THE EQUAL PROTECTION CONCEPTS INHERENT IN THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

In declaring a durational residency requirement for aliens seeking welfare assistance unconstitutional in *Graham v. Richardson*, 403 U.S. 365 (1971), this Court held that

> aliens as a class are a *prime example* of a 'discrete and insular' minority . . . for whom . . . *heightened judicial solicitude is appropriate. Graham, supra*, at 372. (Emphasis supplied).

See also *Nielsen v. Sec. of Treas.*, 424 F.2d 833, 846 (D.C. Cir. 1970); *Jalil v. Hampton*, 148 U.S. App. D.C. 415, 460 F.2d 923 (1972); *Faruki v. Rogers*, 349 F. Supp. 723 (D.D.C. 1972), all requiring a "compelling governmental interest" to justify an alien classification.

Appellant argues that, despite the political hypocrisy of allowing the federal government to do that which is admittedly constitutionally barred to the states (see, e.g., *Memorial Hospital v. Maricopa County*, 42 U.S.L.W. 4277 (U.S., February 26, 1974)), the enumerated constitutional grant of authority over aliens given to Congress, but not to the states, provides the underlying hypothesis which negates the requirement of "strict judicial scrutiny" reserved for suspect class legislation enacted by the states. Appellant's Brief at p.19. We maintain, however, that even if the power of Congress over immigration and naturalization could somehow transmogrify "alienage" into a "non-judicially suspect" classification, a concession we are obviously not prepared to make, in the context of the delivery of public health care benefits, there is simply no constitutionally acceptable reason for differentiating between elderly citizen-beneficiaries and similarly situated elderly aliens.

A. There is no correlation between the classification and the purpose of the Public Welfare Program.

The cases of *Shapiro v. Thompson*, 394 U.S. 618 (1969), *Graham v. Richardson*, 403 U.S. 365 (1971), *In re Griffiths*, 413 U.S. 717 (1973), and *Sugarman v. Dougall*, 413 U.S. 634 (1973), all of which held, in one way or another, that the states may not, consistent with the Equal Protection Clause of the Fourteenth

Amendment, impose durational and permanent residency or citizenship requirements upon either residents or aliens as prerequisites to otherwise qualified beneficiaries of public programs make it irrelevant whether the source of the benefits are state or federal. In any event, the alienage exclusion provisions of the social welfare program under consideration herein cannot possibly be justified by the primary reason for the provisions advanced by the Appellant, i.e., the totally unrelated fact that eligibility depends on the "demonstra(tion) (of) a substantial and enduring connection to the United States." Appellant's Brief at pps. 8, 17, 28, 33. Virtually nowhere in Appellant's Brief do we find even a theoretically relevant correlation between the need for medical services and the length of residence or the degree of allegiance to the United States of the medically needy alien.[7]

[7]Cf., *Johnson v. Robison*, 42 U.S.L.W. 4313, 4317 (U.S. March 4, 1974); compare, e.g., Petitioner's Brief in *Hampton v. Mow Sun Wong*, No. 73-1596, filed in this Court in October, 1974, where at least some superficially plausible attempt is made to equate the conduct of the political and fundamental operations of the federal government with the justification for excluding aliens from federal civil service employment. But see, *Perkins v. Smith*, 370 F.Supp. 134, 136 (D. Md. 1974).

This is not to imply agreement with the merits of the government's argument in *Hampton*, but only to suggest that, in the instant case, not even a pretense of justification is advanced for treating the medically needy alien differently from the similarly situated elderly citizen. We are convinced that Respondents in *Hampton* will deal effectively with, and convice the Court that, the government's argument referred to in this footnote has no merit when measured against appropriate federal constitutional standards.

B. The right to publicly created health care benefits is a fundamental right, the denial of which by invidious classifications requires a compelling governmental interest.

The district court, in the instant case, in examining the constitutionality of the dual residency requirements of the Supplemental Insurance Plan, had difficulty in deciding whether to apply to the classification the "rational basis" test, or the "compelling governmental interest" test to determine its constitutionality (J.S. App. 20-25). But cf., e.g., *Perkins v. Smith*, 370 F. Supp. 134-135, 138 (D. Md. 1974) (compelling governmental interest test applied to a constitutional challenge excluding aliens from jury participation). At the time of the lower court's decision, however, it did not have the benefit of several recent Supreme Court decisions which would have clarified the issue, and established, beyond question, that the classifications challenged herein are not only "suspect", but result in the deprivation of "fundamental rights" which, for either case, may be constitutionally justified only by a "compelling governmental interest," rather than the traditional "rational basis" standard. The court below finally settled on a test which required that the classifications in question, to be held consitutional, must be both "rationally based *and free from invidious discrimination*" (J.S. App. 25). (Emphasis theirs).

In *Memorial Hospital v. Maricopa County*, 42 U.S.L.W. 4277 (U.S. Feb. 26, 1974), this Court had an opportunity to compare the relative "fundamentality" of the right to public welfare, *Shapiro v. Thompson*, *supra*, with the right to public health care, both denied

on the basis of similar durational residency requirements:

> In *Shapiro*, the court found denial of the basic "necessities of life" to be a penalty.
>
> * * *
>
> Whatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear *that medical care is as much "a basic necessity of life" to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements.*
>
> It would be odd, indeed, to find that the State of Arizona was required to (pay) welfare assistance to keep (the plaintiff) from discomfort of inadequate housing or the pangs of hunger but could deny him the medical care necessary to relieve him from the wheezing and gasping for breath that attend his illness. At 4280. (Emphasis supplied; citations and footnotes omitted).

The eight to one majority in *Memorial Hospital* concluded that a residency classification which serves to deny medical benefits is unconstitutional "unless shown to be necessary to promote a *compelling* state interest . . . " (Emphasis theirs). 42 U.S.L.W., *supra* at 4281.

C. The denial or deferral of publicly created health care benefits to a class solely due to the political unpopularity of the class is unconstitutional.

In another case decided subsequent to the district court decision below, *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973), this Court held that a congressional attempt to define the term "household" so as to exclude "hippies" (who, incidentally, unlike aliens, are not barred from the political process) from the food stamp program could not be sustained because it was an illegitimate attempt to harm a "politically unpopular group." Id. at 534.

With sporadic exceptions, the judicial history concerning aliens, prior to *Graham*, has not been particularly kind. Indeed, legislation which has had as its obvious purpose the oppression of aliens solely due to their political unpopularity was rather consistently upheld by this Court.

In 1914, legislation denying aliens the right to hunt and possess firearms for that purpose was upheld as constitutional. *Patsone v. Pennsylvania*, 232 U.S. 138 (1914). Aliens were denied the right to participate in public works projects in 1915. *Heim v. McCall*, 239 U.S. 175 (1915). In the 1920s, constitutional challenges to the common-law denial of the right of aliens to hold land were repeatedly rebuffed. *Webb v. O'Brien*, 263 U.S. 313 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923); *Terrace v. Thompson*, 263 U.S. 197 (1923); *Cockrill v. California*, 268 U.S. 258 (1925).[8] And, in 1927, the Court upheld a Cincinnati ordinance excluding aliens from operating poolrooms where undesirables allegedly congregated. *Clarke v. Deckebach*, 274 U.S. 392 (1927).

[8] The validity of these decisions has recently been called into question by *Oyama v. California*, 332 U.S. 633 (1948); moreover, these decisions would clearly not withstand constitutional scrutiny by current standards.

Notwithstanding the apparent trend of these early cases, we maintain that the trilogy of *Graham*, *Sugarman*, and *In re Griffiths*, has expressly rejected the notion that aliens may be treated oppressively and differentially merely because the majority population views lawfully admitted aliens as "foreigners" to be scorned and treated as constitutional outcasts.[9] Indeed, these three decisions have not only taken as axiomatic the proposition that political unpopularity is an illegitimate, and therefore, unconstituional basis for class legialation (*Moreno, supra*, at 435), but when the class adversely affected is composed of aliens, suspicion of *the class* has now been judicially replaced by *suspicion of the classification*! Cf., *Davis v. Richardson*, 342 F. Supp. 588 (D.C. Conn. 1972), aff'd 409 U.S.

[9]See, e.g., *In re Griffiths*, 413 U.S. 717, 719-720; *Sugarman v. Dougall*, 413 U.S. 634, 644-645; compare Justice Rehnquist's dissent in *Sugarman*, rejected by his eight brother justices, where he correctly points out that the foundations for this new and protective doctrine towards aliens are, from a jurisprudential analysis, chronologically inconsistent and highly selective in finding support in favorable case precedents, *Sugarman, supra*, at 653-656. We submit, however, that Justice Rehnquist's comments serve only to further support our conclusion that the decisions in these cases were purposefully and methodically reached thus forging a near-unanimous and consistent constitutional policy requiring that class legislation unfavorable to aliens may only be justified, not merely by the talismatic claim that the *power* to act constitutionally validates the action taken, but rather that the action taken must also be consistent with a "compelling governmental interest." Indeed, Justice Powell traces in *Griffiths*, the rise and fall of the anti-alien doctrine previously sustaining legal restrictions upon the rights of aliens, which is now no longer automatically accepted as constitutional by the Court. *In re Griffiths, supra*, at 720-721.

1069 (1972). Thus the Court has found support and comfort in the almost ancient pledge of equal protection for aliens under the laws, originally articulated in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) and such later cases as *Truax v. Raich*, 239 U.S. 33 (1915). The Court has, moreover, paid homage to the California case of *Purdy & Fitzpatrick v. California*, 456 P.2d 645 (1969), which drew into question the constitutional foundations of *Heim v. McCall, supra. Graham, supra*, at 376. And in commenting on 42 U.S.C. § 1981, which implements the Fourteenth Amendment by insuring "[a]ll persons" in every State "the full and equal benefit of all laws . . . for the security of persons and property"[10] the Court held that these principles:

> Embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges under non-discriminatory law. *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410, 420 (1948).

Justice Powell, in *Griffiths, supra*, at 719, stated in clear, uncomplicated and precise language what is unquestionably the underlying theme for the Court's attitudinal change towards alien classifications:

> From its inception, our nation welcomed and drew strength from the immigration of aliens. Their contributions to the social and economic life of the country was self-evident, especially during periods when demand for human resources greatly exceeded native supply.

See also, *Graham, supra*, at 376; cf., *Oyama v. California*, 332 U.S. 633-646 (1948).

[10]For an historical analysis and thorough discussion of the purpose of substituting the term "all persons" for "all citizens" in §1981, see *Guerra v. Manchester Terminal Corp.*, 350 F.Supp. 529, 533-536 (S.D. Tex. 1972).

Lower courts have, with relish, been fast to pick up on the new standard of judicial solicitude towards aliens, giving even further credibility and recognition to the rejection of the outmoded and repudiated anti-alien policy. The judiciary has with enthusiasm come to protect aliens from invidious legislation promulgated for no other reason than to harm or punish them as a politically unpopular group, whose own political impotence makes it virtually impossible for it to protect itself through normal political processes. See, e.g., *Hampton v. Mow Sun Wong, cert. granted*, No. 73-1956; *Jalil v. Hampton*, 460 F.2d 923 (D.C. Cir. 1972); *Sam Andrews' Sons v. Mitchell*, 457 F.2d 745 (9th Cir. 1972); *Chapman v. Gerard*, 456 F.2d 577 (3rd Cir. 1972); *Faruki v. Rogers*, 349 F. Supp. 723 (D.D. C. 1972); *Machado v. Dept. of Health and Rehab. Serv.*, 357 F.Supp. 890 (S.D. Fla. 1973); *Teitscheid v. Leopold*, 342 F. Supp. 299 (D.C. Vt. 1971); *Miranda v. Nelson*, 351 F. Supp. 735 (D. Ariz. 1972); *U.S. v. Khan*, 336 F. Supp. 354 (E.D. Pa. 1971); *Zarate v. Dept. of Health and Rehab. Serv.*, 347 F. Supp. 1004 (S.D. Fla. 1971); *Younus v. Shabat*, 336 F. Supp. 1137 (N.D. Ill. 1971); *Hosier v. Evans*, 314 F. Supp. 316 (D.C.V.I. 1970); *cf.*, *"Symposium on Durational Residency Requirements"*, *6 Suffolk L.Rev.* 565, 582 (1972).

Thus, the proposition is well settled that legislation which is promulgated solely for the purpose of harming a politically unpopular group is *ipso facto* illegitimate, – and unconstitutional. E.g., *In re Griffiths*, 413 U.S. *supra*, at 722, n.8; *U.S. v. Moreno, supra*, at 534. When the group adversely affected by the legislation happens to be "aliens"

> *the classifications involved . . . are inherently suspect and are therefore subject to a strict judicial scrutiny whether or not a fundamental right is impaired.*
>
> Appellant's reliance on *Dandridge v. Williams*, 397 U.S. 471 (1970) is . . . misplaced, since the classification involved in that case (family size) neither impinged upon a fundamental constitutional right nor employed an inherently suspect criterion. *Graham v. Richardson, supra*, at 376. (Emphasis supplied).

D. An alien's "substantial and enduring connection" to the United States is an unconstitutional basis for denying public health care benefits.

Thus, we again must examine the justification advanced by the government in the instant case for imposing dual residency requirements upon aliens, while allowing citizens similarly situated to immediately receive the benefits of Medicare Part "B" medical services. And again the primary reason articulated is that aliens must first "have demonstrated a substantial and enduring connection to the United States." Appellant's Brief at pps. 8, 17, 28, 33. There is absolutely no correlation, even under the rational basis test, between the alien's "substantial and enduring connection" with the United States and his need for supplemental medical insurance benefits. In short, the government finds in the "unique legal status" of aliens, a reason for granting them the "privilege" of receiving publicly supported medical benefits subject to, however, virtually any conditions the government wishes to

impose. Such reasoning was thoroughly rejected by this Court in *Graham v. Richardson, supra*, at 374.[11] Appellant has not shown in any way how the classification adverse to aliens advances a rational, legitimate, or compelling governmental interest. This discrimination between persons of equal need is at least as irrational as that condemned by this Court in *Jimenez v. Weinberger*, 42 U.S.L.W. 4948 (U.S. June 19, 1974).

E. The so-called *Dandridge v. Williams*, 397 U.S. 471 (1970) rational basis test is inapplicable to the constitutionality of classifications where finite and limited resources have little or no bearing on the creation of the class.

In *Jimenez*, the question presented was the constitutionality of a section of the Social Security Act which provided that certain illegitimate children could receive disability benefits only after establishing that the disabled wage earner parent contributed to the child's support or lived with him prior to the parent's disability. The government, relying on the so-called *Dandridge v. Williams*, 397 U.S. 471 (1970) "rational basis" doctrine relating to classifications involving social welfare programs, advanced the superficially plausible argument that the class of adversely affected illegitimates was created to avoid spurious claims. The district court agreed and upheld the classification. This Court reversed.

[11] Reaffirmed and emphasized in *Sugarman v. Dougall*, 413 U.S. 634, 644 (1973).

As it did in *Graham, supra*, at 376, this Court found in the government's *Jimenez* analysis a misreading of *Dandridge*. The Chief Justice, expressing the views of eight members of the Court, rejected the notion, also advanced by Appellant herein (Appellant's Brief at p. 21-22), that the *Dandridge* test of constitutionality is met by a finding of minimal rationality in social welfare programs, no matter how "illogical, . . . and unscientific" the class. *Jimenez, supra*, at 4949. The Court, having previously noted, in *Graham*, that the *Dandridge* case itself did not involve a "suspect classification" as did both *Graham* and *Jimenez* (at 4949), also noted that unlike *Dandridge*, *Jimenez* did not involve the problem of allocating finite fiscal resources—an obviously important consideration in the formulation of the *Dandridge* equal protection standard. Particularly pertinent to the instant case were the Chief Justice's comments comparing *Jimenez* to *Dandridge*:

> Here, by contrast, there is no evidence supporting the contention that to allow illegitimates in the classification of appellants to receive benefits would significantly impair the federal Social Security trust fund and necessitate a reduction in the scope of persons benefitted by the Act.
>
> * * *
>
> Accepting this view of the relevant provisions of the Act, we cannot conclude that the purpose of the statutory exclusion of some after-borne illegitimates is to achieve a necessary allocation of finite resources and, to that extent, *Dandridge* is distinguishable and not controlling. *Jimenez* 42 U.S.L.W., *supra*, at 4949.

Cf., *Davis v. Richardson*, 342 F. Supp. 588 (D.C. Conn. (1972); aff'd 409 U.S. 1069 (1972).

Although a fiscal argument in the instant case was advanced by the Appellant-Defendant in the district court, that court disposed of the argument in short order, additionally pointing out that the delays inherent in a durational waiting period for medical services will inexorably lead to a deterioration in the health of elderly aliens and

> appears more likely to increase, rather than decrease, the costs of the supplemental medical insurance program, unless the rather morbid presumption is indulged that mortality among members of the class prior to the time that they become eligible will more than offset such increases. *Diaz*, (J.S. App. 30).

See also, *Harrell v. Tobriner*, 279 F. Supp. 22, 27 (D.D.C. 1967). Appellant, apparently finding the district court's analysis persuasive, has totally abandoned any fiscal argument in its Brief before this Court.

F. The federal enumerated power over aliens is irrelevant to the test of the constitutionality of classifications of aliens unrelated to immigration, naturalization, citizenship or national sovereignty.

Refraining from attempting the impossible task of advancing a "compelling governmental interest" to justify the dual residency requirements at issue in this case, Appellant has chosen rather to argue that the alien classifications created by Congress are constitutionally sound because Congress, unlike the states, has passed these alien exclusionary provisions pursuant to the enumerated power of naturalization of Art. I, Sec. 8,

Cl. 4. Appellant argues that congressionally enumerated powers are a source so exclusively and absolutely awarded to Congress that legislative acts flowing therefrom are virtually free of judicial scrutiny.[12] Cf., Appellant's Brief at p. 20; more specifically, see Petitioner Hampton's Brief at p. 24 *et. seq.* Inherent in this so-called "plenary" power argument are two basic assumptions: (1) That while a State classification based on "alienage" is indeed "inherently suspect," a similar federal classification is not (Appellant's Brief at pps. 18-19) and; (2) That congressional authority over immigration and naturalization is so absolute and total that if it should choose to, it may without constitutional inhibitions, reach into the alien-resident's everyday activities, regardless of the relationship or correlation between those activities and his status as an alien.

(1) As to the first assumption: Underlying the assertion in *Graham, supra*, at 372 that "classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny," is the fact that:

> aliens are not simply politically disadvantaged as are members of other 'inherently suspect' classifications: they lack the power of the ballot entirely at both state and federal levels. Moreover aliens have endured a long history of open discrimination at the hands of the political process. *Diaz*, (J.S. App. 23).

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[12]Somewhat inconsistently, and without explanation or elaboration, Appellant concedes that "[a]n alien is, of course, a (person) within the meaning of the Fifth Amendment . . . and the Fourteenth Amendment" (Appellant's Brief at p.12). (Citations omitted). See also, e.g., *Johnson v. Robison*, 42 U.S.L.W. 4313, 4314, n.4; *Morris v. Richardson*, 346 F.Supp. 494, 499 (N.D. Ga. 1972).

Compare, *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28, (1973), and *In re Griffiths*, 413 U.S. 717, 726-728 (1973). Perhaps as important as the exclusion from the voting franchise is the fact that aliens are almost totally excluded from political decisions which shape their lives. Cf., e.g., *Perkins v. Smith*, 370 F. Supp. 134, 136 (D. Md. 1974); *United States v. Thompson*, 452 F.2d 1333, 1346 (D.C. Cir. 1971); see also, ironically, the Appendix attached to the Petitioner's Brief in *Hampton*, listing the innumerable disabilities imposed by Congress upon *aliens qua aliens*; and, indeed, even today federal civil service employment is totally barred to aliens, on the pretext that federal public activities should be performed only by citizens, regardless of the relationship between the employee's job and his nationality.[13]

> Because the political system provides no check on such discrimination, there may well be instances when application of a compelling interest standard is warranted in review of state and federal enactments to protect aliens from discrimination resulting from their lack of political representation. *Diaz*, (J.S. App. 23-24).

E.g., *Jalil v. Hampton*, 460 F.2d 923 (D.C. Cir. 1972); *Faruki v. Rogers*, 349 F. Supp. 723 (D.D.C. 1972). The other side of the alienage coin which further warrants

[13]This exclusion has been declared unconstitutional in *Wong v. Hampton*, No. 72-1079 (9th Cir. decided Jan. 25, 1974) *cert. granted sub. nom., Hampton v. Wong*, No. 73-1956. Even if this pretext for job discrimination is found tenable by this Court it could hardly form the basis for justification for denying aliens medical treatment.

the "strict judicial scrutiny" test for legislation which adversely affects aliens as a group, regardless of its federal or state source, is that "aliens, like citizens, pay taxes, support the economy, serve in the armed forces,[14] and contribute in myriad other ways to our society." *In re Griffiths*, 413 U.S., *supra*, at 722; see also, *Graham v. Richardson*, *supra*, at 376; and *Sugarman v. Dougall*, 413 U.S., *supra*, at 645.

The disabilities of non-citizenship, in consideration of the contribution aliens have made to our society, show not only that aliens do indeed pay their dues, but also establish that the multiple bases for the "strict scrutiny" test for legislative constitutionality should be the same, regardless of the source of legislation, whether state or federal. Moreover, the undeniable fact that the federal government has exclusive authority regarding aliens, over immigration, naturalization and matters dealing with national sovereignty should mandate even *greater* scrutiny of federal than state activities which adversely affect the lives of aliens: After all, the Bill of Rights exists to limit *the abuse of authority*. Where, as with the states, there is little or no authority, a prophylactic effect will serve to limit or eliminate unconstitutional abuses. Cf., *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968).

(2) The second assumption, repeatedly urged throughout Appellant's Brief to the point of implying that Appellant's position is totally founded upon its

[14]Like resident aliens; immigrants, Cuban parolees, and conditional entrants were subject to military induction until the induction authority expired, and are currently subject to the same Selective Service registration requirements as are citizens. See, letter from Peter T. Straub, General Counsel, Selective Service System, dated October 1, 1974. App. 1a-2a.

credibility, is that the power to regulate aliens through Art. I Sec. 8 Cl. 4 is so absolute, total and "plenary," that the judiciary is required to acknowledge and accept, virtually without constitutional inquiry, all acts of Congress touching upon or affecting the lives of aliens, no matter how irrational, no matter how unrelated to admission to the United States, to immigration, naturalization, deportation, matters of national sovereignty, or, as in the instant case, no matter how unrelated to a publicly created social welfare benefit program.

An examination of the judiciary's treatment of other enumerated powers of Art. I immediately casts doubt upon the claim of unfettered authority advanced by Appellant. As stated in *United States v. Robel*, 389 U.S. 258, 264 (1967);

> When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated.

In the same case, but quoting from *Home Bldg & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 426 (1934): "[E]ven the war power does not remove constitutional limitations safeguarding essential liberties." *United States v. Robel, supra*, at 264; see also, *United States v. Cohen Grocery*, 255 U.S. 81 (1921).

Similarly, claims of "plenary" powers under Art. I, Sec. 8, Cl. 3, the international commerce clause, have been found less than absolute when they clash with other provisions of the Bill of Rights. See, e.g., *Head Money Cases*, 112 U.S. 580, 590-591, 593-94 (1884);

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893).

With regard to the constitutional limitations on the so-called "plenary" powers of Congress over aliens, in *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) Justice Murphy stated in concurrence:

> The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and *Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority*. (Emphasis added).

See also, *Wong Wing v. United States*, 163 U.S. 228 (1896) and *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931). As was so aptly put in *Ramos v. United States Civil Service Comm.*, 376 F. Supp. 361, 365 (D.P.R. 1974):

> Even before *Graham* the Supreme Court had held that aliens were broadly entitled to 'the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility.' *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893). See *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) cited with approval in *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-97 n.5 (1953). *Graham, Sugarman,*

> and *Griffiths* are novel only in that they give constitutional standing to employment and welfare rights via the Equal Protection Clause.

The fact of the matter is that all the cases cited by Appellant in support of Congressional plenary power over aliens invariably involve matters of immigration, naturalization, or characteristics inherent in a notion of "citizenship," including the exercise of political rights and the involvement in political functions. The District of Columbia Court of Appeal in *United States v. Thompson*, 452 F.2d 1333 (D.C. Cir. 1971) found both a "suspect classification" and a fundamental interest. The court overtly recognized its duty to apply the compelling governmental interest and necessity test–regardless of the existence of a "plenary" power.

> One of the rights which the Constitution guarantees District (of Columbia) residents, in common with all residents of the United States, is the right not to be arbitrarily singled out for special treatment not accorded to others similarly situated. Thus, it is no response to contend, as the Government apparently does, that Congress was exercising its 'plenary powers' when it created such an irrational classification. *United States v. Thompson*, supra, at 1338. (Citations omitted).

See also, *Perkins v. Smith* 370 F. Supp. 134 (D. Md. 1974) (compelling interest test to determine right to exclude aliens from *federal* juries).

In *Ramos v. United States Civil Serv. Comm'n.*, 376 F. Supp. 361, 366 (D.P.R. 1974) the court held that:

> It would seem unthinkable that 'the same Constitution would impose a lesser duty (than the states) on the Federal Government' in its dealings with lawfully admitted permanent resident aliens–

> at least in those dealings unrelated to Congress' special responsibilities for naturalization.

The same court concluded

> that Congress itself, when legislating generally on matters not related to the furtherance of its naturalization responsibilities, may not single out aliens for discriminatory treatment forbidden to the states. Any other result would lead to a peculiar hierarchy of rules, in which the federal government would enjoy a license to engage in practices condemned by the courts as unfair and discriminatory when done by the states. *Ramos, supra*, at 366.

The many case citations which appear in Appellant's Brief for the purpose of establishing Congress' "plenary" power in matters relating to alienage do not, we maintain, diminish in any way the vitality of the "strict judicial scrutiny" test originally mandated by *Graham, supra*, in cases involving classifications based on alienage. These cases merely establish a "plenary power" theory which Appellees readily concede: That Congress does, by and large, through its naturalization powers, have clear and almost exclusive authority over aliens–so long as the power is exercised with regard to matters directly relating to alienage. Despite the sometimes excessive rhetoric of these cases, the facts of the cases invariably establish that the issue before the court relates directly, or at least indirectly, to immigration, deportation or other matters peculiar to alienage. Indeed, there is nothing in these decisions which diminishes Appellees' argument one wit, i.e., that legislation, be it federal or state, is (1) not any the less subject to the "strict judicial scrutiny" standard, (2)

must not be invidiously discriminatory (in the context of the instant case, this means the alien exclusion must relate to the purpose of the supplementary medical insurance program, 42 U.S.C. §1395k), and (3) must demonstrate it serves a "compelling governmental interest." In the instant case, the government bears a heavy burden (*Griffiths, supra*, at 721-22), in establishing that the alien's "substantial and enduring connection with the United States" is in any way related to either easing the financial burden of adequate medical care on those who cannot afford it, the expressed purpose of the Medicare Act, or to any other matter related to the purposes of the Act. The Appellant has cited many cases relating to aliens, but none are supportive of a "federal plenary power theory" which would negate either the requirement of "strict scrutiny" or the "compelling governmental interest test" to determine whether the residency requirements at issue herein are constitutional. Several cases cited by Appellant, however, deserve more than just passing comment to firmly establish they are not controlling precedent for Appellant's argument.

G. The cases of *Flemming v. Nestor* and *Richardson v. Belcher* are not controlling despite the analogous source of funding in the instant case.

The district court summarily dismissed the government's reliance on the cases of *Flemming v. Nestor*, 363 U.S. 603 (1960) (cited in Appellant's Brief at pps. 14, 21, 23) and *Richardson v. Belcher*, 404 U.S. 78 (1971)

(Appellant's Brief at p.21) holding that "Nestor and its progeny is inapposite to the extent that none of those cases involved even a colorable claim of discrimination." *Diaz*, (J.S. App. 21). While this holding is consistent with the district court's standard of constitutionality in the instant case, requiring *both* a "rational basis" and non-invidious discrimination, we believe these cases deserve closer scrutiny. But see, *Richardson, supra*, at 81 (no invidious discrimination).

In *Richardson*, after substantial contributions were made by employees and employers to a state disability program, an amendment to the federal Social Security Act required a proportionate reduction in federal social security benefits when the disabled wage earner received state disability benefits as a result of the same injury. The new federal social security provision, which effectively reduced the total disability benefits received by the injured wage earner, was attacked as a denial of equal protection under the Fifth Amendment to the Constitution. The Supreme Court sustained the constitutionality of the challenged statute, primarily relying on *Flemming v. Nestor*, 363 U.S. 603 (1960), (although, as indicated above, the Court additionally found the federal reduction in benefits free from invidious discrimination presumably because there was a rational basis for denying an injured wage earner double compensation for the same injury). We, however, go one step further and suggest that the provision challenged in *Richardson* may well be justified as a "rational basis" "to achieve a necessary allocation of finite resources . . ." See, *Jimenez v. Weinberger*, 42 U.S.L.W. 4948, 4949 (U.S. June 1974) (explained as

the ground for a similar holding in *Dandridge*, see this brief, *supra*, at 23).

As indicated above, the case of *Flemming v. Nestor*, *supra*, was dismissed as non-controlling by the district court in the instant case because it involved not even "a colorable claim of discrimination."

Challenged in *Flemming* was a provision which denied to the Plaintiff social security benefits to which he was otherwise entitled because he was a deported alien, having been found guilty of an act related to his former membership in the Communist party. Complicating the case was the fact that the specific Act under which the alien was deported was promulgated long after the alien's Communist affiliations had been terminated, and after his social security benefits had accrued. Appellant herein relies on *Flemming* for two propositions: (1) That Congress may "fix the conditions under which aliens are permitted to enter and remain in this country." Appellant's Brief at p. 14; and (2) that Congress may modify its "judgments and preferences as to the proper application of the Nation's resources which evolving economic and social conditions will of necessity in some degree modify." Appellant's Brief at p. 21.

(1) As to the first point, although we believe we have firmly established that congressional authority over aliens is not, in fact, absolute and "plenary" in all respects, we concede exclusive congressional authority over the deportation of unwanted aliens residing in the United States. Indeed, we submit that the incidental deprivation of social security benefits in *Flemming*, resulting from the deportation process, as it did, could stand alone as constitutional authority for the chal-

lenged provision. But this basis for the decision in *Flemming* provides no constitutional basis for depriving medical care benefits to aliens lawfully and properly within the United States where such deprivation is totally unassociated with the extraordinary authority Congress has over aliens.

(2) Appellant attempts to relate the holding in *Flemming* to congressional authority to allocate national resources. However, the power to spend is not uninhibited and unfettered by the protections of the Bill of Rights, particularly the due process clause of the Fifth Amendment. See, e.g., *Jimenez v. Weinberger*, *supra*; *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). Moreover, *Jimenez* held, there was "no evidence supporting the contention that to allow illegitimates in the classification . . . to receive benefits would significantly impair the federal social security trust fund and necessitate a reduction in the scope of persons benefitted by the Act." *Jimenez*, *supra*, at 4949. The Court points out that the only claim the Secretary advanced to support the challenged provision in *Jimenez* was "to prevent spurious claims and ensure that only those actually entitled to benefit receive payments." 42 U.S.L.W. *supra*, at 4949.

As was repeatedly pointed out in Appellant's Brief in the instant case, "the dominant theme of the conditions imposed by Congress on alien eligibility for benefits or privileges available to citizens is that they demonstrate some substantial and enduring connection with the United States." Appellant's Brief at p.17. To paraphrase Chief Justice Burger's conclusion in *Jimenez*; accepting this view of the relevant provisions of the Act, we cannot conclude that the purpose of the statutory

exclusion of some aliens in the United States from supplemental insurance benefits is to achieve a necessary allocation of finite resources; 42 U.S.L.W. *supra*, at 4949, or any other valid objective.

In *Johnson v. Robison*, 42 U.S.L.W. 4313, 4317 (U.S. March 4, 1974), the due process implications of reasons for creating a legislatively excluded class, and its relationship to the goals and purposes which would otherwise benefit that class, were clearly set forth:

> [O]ur analysis of the classification proceeds on the basis that, although an individual's right to equal protection of the laws 'does not deny . . . the power to treat different classes of persons in different ways [;] . . . [it denies] the power to legislate that different treatment be accorded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' (Citations omitted).

The application of this test alone, regardless of the question of alienage as a "suspect classification," and regardless of any special "judicial solicitude" towards aliens must necessarily lead this Court to declare each of the residency requirements unconstitutional since "the dominant theme of the conditions imposed by Congress on aliens" (Appellant's Brief at p. 17) is totally unrelated to the purpose of the medical insurance program. Accordingly, they cannot be sustained under any constitutional theory.

H. The debates of the constitutional convention on residency requirements.

Appellants have made much of the arguments concerning residency requirements for aliens recorded in 2 Farrand, The Records of the Federal Convention of 1787 (1966 rev. ed.). Appellant's Brief at pps. 13, 14, 16, 28. However, an examination of the Records cited by Appellants makes it quite clear that virtually all constitutional discourse concerning residency requirements quoted or cited in Appellant's Brief have been taken out of context.

These constitutional debates, contrary to the implications of Appellant's Brief, concern themselves almost exclusively with the question of whether durational residency requirements should be expressly contained in the Constitution with respect to resident aliens who aspire to *public office*. See, e.g., 2 Farrand, Records of the Federal Convention, at 235-238, 268-269. The evidence is overwhelming that the constitutional debaters were concerned only, or at least primarily, with the realistic anticipation (perhaps then more than now) that the young nation might be threatened by the un-American ideas of aliens holding high public office, e.g., Congressmen and Senators. Particular concern was voiced over matters of foreign policy and foreign affairs, since high public officials are often called upon to deal with other nations and may find it difficult to disassociate themselves from their former national allegiances. Thus was argued the need for constitutional assurances to protect or at least minimize the likelihood of divided loyalties among newly immigrated public officials. In response to these fears it was suggested that

the Constitution expressly contain durational residency requirements for those aliens who aspire to decision-making positions which may have an impact on the foreign affairs of the United States. As we know, the Constitution eventually did adopt some of these suggestions. See, e.g., *Sugarman v. Dougall, supra*, 651-652 (Rehnquist, J., dissenting). However, the failure of Justice Rehnquist to convince any of his brother members of the Court that this historical analysis should lead them to hold as constitutional, residency requirements imposed on alien beneficiaries of social welfare programs, or even state civil service jobs, should be more than convincing evidence of the unpersuasiveness of the same argument advanced by Appellant in the instant case.

II.

PERMANENT RESIDENTS, IMMIGRANTS, CUBAN PAROLEES AND CONDITIONAL ENTRANTS.

Until now, as we have noted, our argument has made no mention of the fact that the class recognized by the district court does not include *all aliens* residing in the United States. This brief, *supra*, at 6, n.2. The district court certified the class as limited only to "immigrants" which the district court defined "in its technical sense" as comprising "immigrants" [as defined by the Immigration and Nationality Act (hereinafter referred to as the "Act"), 8 U.S.C. §1101(a)(15)], "conditional entrants, as well as to include those who, like Cuban parolees, may become immigrants through retroactive adjustments of status." *Diaz*, (J.S. App. 20, n.8).

Appellant's Brief, while noting, almost in passing, the *recognized* class as defined above, (Appellant's Brief at pps. 6, n.7 and 33, n.30), nevertheless, generally makes no distinction between *all aliens* and the recognized class for purposes of argument. The district court, despite a rather detailed definitional analysis of the elements of the recognized class[15] like Appellant made no substantive arguments, findings or decisions on the basis of the class as it had defined and limited it. But for the fact that we believe an analysis and understanding of the terms "permanent resident," "immigrant," "Cuban parolee," and the "conditional entrant," could conceiveably make a difference in either the ultimate outcome of the case, or in the manner in which the Court writes its opinion, we would be quite prepared to go along with both the Appellant and the district court in assuming the class, as limited and defined by the district court, has no substantive implications.

For reasons noted below, while we do not urge the Court to declare the challenged residency requirements unconstitutional as to *all aliens* (see this brief, *supra*, at 6, n.2) what we do suggest is that the members of the class *recognized* by the district court be deemed technically or functionally to be not merely "immigrants," but "aliens lawfully admitted for permanent residence" as that term is used in the supplemental medical insurance program, (42 U.S.C. (Supp. II) §1395o(2) (B). The effect of the suggested construction would be to totally remove both the question of the

[15]E.g., *Diaz*, (J.S. App. 16, n.4, 17, n.5, 18-19, n.6, 20, n.8, 35, n.18).

constitutionality of the "lawfully admitted for permanent residence" requirement and the "separability" issue from the case, leaving to be decided by this Court only the question of the constitutionality of the durational residency requirement. Cf., e.g., *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971). The elimination of these issues follows from the fact that if the class recognized by the district court is deemed, by reason of our suggested statutory construction, to be "aliens lawfully admitted for permanent residence," Appellees would have no standing to challenge the constitutionality of this residency requirement since they would then not be in an adverse position with respect to this requirement.

The statutory construction which we urge herein is merely an extension of the approach taken by the district court in defining the term "immigrant" used to describe the recognized class. The district court found sufficient reason to include conditional entrants and Cuban parolees (hereinafter referred to as "refugees") within the recognized class of "immigrants." The special status granted refugees, from the district court's point of view, made them "technically" (i.e., functionally) "immigrants." *Diaz*, (J.S. App. 20, n.8). We agree with the district court's analysis for several reasons.

It is to be observed that the Act's definition of the term "immigrant" includes "every alien except an alien who is within one of . . . (twelve) . . . classes of non-immigrant aliens . . ." The common characteristic of the twelve nonimmigrant classes is that they describe aliens who temporarily enter the United States, without any intention of abandoning their native country. These twelve categories do not even remotely describe

refugees, who, as will be shown below, enter the United States with the express congressional understanding that they will reside here permanently. One would conclude from this definition of the term "immigrant," that it includes both conditional entrants and Cuban parolees. However, this is not the case, because under the Act, to be lawfully admitted as an "immigrant" one must have been issued an "immigrant visa," 8 U.S.C. §1101(a)(16). Furthermore, implicit in 8 U.S.C. §1153(a)(7) (conditional entrants) and in 80 Stat. 1161 (1966)[16] (Cuban parolees), authorizing post-entry immigrant visas to refugees, is the fact that neither conditional entrants nor Cuban parolees enter the United States possessed of immigrant visas.

Thus, it is clear that conditional entrants and Cuban parolees are neither "immigrants" nor "nonimmigrants." They nevertheless gain lawful entry into the United States as refugees pursuant to 8 U.S.C. § 1153(a)(7) (conditional entrants) or 8 U.S.C. § 1182(d)(5) (Cuban parolees). Notwithstanding the fact that they are not included in the Act's definition of "immigrants," Congress has taken several measures which cumulatively justify the district court's decision to technically include them in the class as "immigrants."

First, as noted above, unlike "nonimmigrants" [8 U.S.C. 1101(a)(15)], refugees come to this country with the understanding that they come as permanent residents. In an amendment to a provision of the Social Security Act, which parallels the Medicare Act, Congress has authorizied welfare payments to the indigent blind, aged and disabled individual who is:

[16] See historical note to 8 U. S. C. §1255.

> . . . either (i) a citizen or (ii) an alien lawfully admitted for permanent residence or otherwise *permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the provisions of section 1153(a)(7) [conditional entrant] or section 1182(d)(5) [parolee] of Title 8).* 42 U.S.C. § 1382c(a)(1)(B) (Supp. II, 1973). (Emphasis supplied).

Moreover, unlike non-immigrants in this country refugees may be issued immigrant visas and may apply for permanent resident status, retroactive to their date of arrival. 8 U.S.C. §§ 1153(g) and (h) (conditional entrants); 80 Stat. 1161 (1966) (Cuban parolees). Additionally, as previously noted, refugees, at least since 1971, have been treated on an equal basis as citizens with respect to military service. App. 1a-2a; see also, Appellant's Brief at p. 17, n.19.

In *United States ex rel. Paktorovics v. Murff*, 260 F.2d 610 (2nd Cir. 1958), procedural due process rights reserved for permanent residents, were afforded a parolee in a deportation proceeding in recognition of his special refugee status. See also, *United States ex rel. Stellas v. Esperdy*, 250 F. Supp. 85, 87 (S.D.N.Y. 1966).

Finally, it is to be noted that the definition under the Act of a lawfully admitted "immigrant" [8 U.S.C. § 1101(a)(15)], is synonymous with the term "lawfully admitted for permanent residence," defined in relevant part as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws . . ." 8 U.S.C. § 1101(a)(20).

Thus, while refugees under the Act, definitionally are neither "immigrants" nor "nonimmigrants," they are clearly admitted to the United States with special immigrant-like status with the explicit congressional understanding that they "permanently reside in the United States under color of law," 42 U.S.C. § 1382c(a)(1)(B) (Supp. II, 1973).

If the district court had good and valid reasons to define refugees as "technical immigrants," there are equally valid reasons to deem the *recognized* class of "technical immigrants" as aliens *technically* "lawfully admitted for permanent residence" as that term is used in the supplementary medical insurance program. As initially noted, by recognizing the class certified by the district court as technically fulfilling the "lawfully admitted for permanent residence" requirement of the supplementary medical insurance program, both a constitutional issue and an issue of statutory construction (separability) would be removed from the case. We believe the construction of the "permanent residency" requirement as urged herein is reasonable and consistent with Congressional intent and accordingly urge the Court to adopt it. Cf., *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

III.

UNDESERVING ALIENS.

The district court in the instant case felt compelled to suggest that certain aliens may in fact be "undeserving" of supplemental medical insurance benefits. The court assumed that certain temporary or transient aliens, aliens who entered the United States

solely to receive medical treatment, and illegal aliens may constitutionally be legislatively excluded as beneficiaries of the program. The court held, however, that the dual requirements of "permanent residence" and five years of continuous habitation in the United States were just too much, and because of overbreadth, the exclusions were held inconsistent with the due process requirements of the Fifth Amendment to the Constitution. *Sugarman v. Dougall*, 413 U.S., 634, 643 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 637, 641-642 (1969); cf., *Memorial Hospital v. Maricopa County*, 42 U.S.L.W. 4277, 4281 (U.S. Feb. 26, 1974).

The Appellant did not make an "undeserving alien" argument in its Brief on appeal – and for good reason. If the reason for the residency requirements is to exclude "undeserving aliens," the requirements must be characterized as irrebuttable presumptions which conclusively deny the alien-applicant the opportunity to show that he does not fall within the category of undeserving aliens. Such irrebuttable presumption have recently, consistently and repeatedly been held to be unconstitutional. *Cleveland Board of Education v. LaFleur*, 42 U.S.L.W. 4186 (U.S. Jan. 21, 1974); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Department of Agriculture v. Murry*, 413 U.S. 508 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Bell v. Burson*, 402 U.S. 535 (1971).

Moreover, to the extent that "undeserving aliens" contemplates transients or temporary visitors these individuals are not covered by the recognized class, thus making the residency requirements applicable to them in any event. See this brief, *supra*, at Sec. II, pps. 38-43.

CONCLUSION

We believe the District Court decision in the instant case represents yet another step in what appears to be a pattern, recently but consistently, developed by the American judiciary, towards the realization of the historically articulated, but all too often ignored in practice, promise of equal treatment for aliens before the law.

Appellees concede that the Constitution grants to Congress as one of its enumerated powers the authority "to establish a uniform Rule of Naturalization," Art. I, Sec. 8, Cl. 4. Moreover, Appellees concede that the naturalization power of Congress, as have other congressionally enumerated powers, been construed by the courts as giving Congress virtually preemptive authority over the subject matter of these powers, in contradistinction to the authority of the states over the same matters. But merely because the federal legislature has greater authority to exercise certain powers than its state counterparts, is not to concede, nor does it at all follow, that the power, when exercised, is not tempered by, nor controlled by those provisions of the Bill of Rights which apply equally to both the federal and state governments. (Appellant does not seriously challenge the fact that the express equal protection provisions of the Fourteenth Amendment are, at least for purposes of this case, inherent within the due process notions of the Fifth Amendment).

The conclusions noted above are not, and have not, been contested by the Appellant. Nevertheless, the Appellant contends the congressional power over aliens is sufficiently expansive, absolute and "plenary," that it

authorizes the statutory exclusion of aliens from a public health care insurance program otherwise available to all citizens upon reaching the age of 65. The exclusion of aliens from the program is accomplished by authorizing enrollment only to aliens lawfully admitted for permanent residence who have resided in the United States continuously for a period of five years. Appellant argues that the "dominant theme" for allowing aliens to partake in benefits otherwise available to citizens, and thus the underlying reason for the residency requirements, is that aliens must first "demonstrate some substantial and enduring connection with the United States." Appellant's Brief at page 17.

Appellees maintain that where, as in the instant case, an "inherently suspect class" (aliens) are excluded from a publicly created program, partially supported by tax revenue funds (including the taxes paid by the excluded aliens) is established to provide a fundamental "necessity of life" (health care to the aged), that the reason for the exclusion must, to meet minimum standards of equal protection, be justified by a "compelling governmental interest." The articulated interest of the federal government, above quoted, as its "dominant" reason for the exclusion has not been shown by Appellant to be either compelling, rational, or even plausible.

A three judge district court unanimously held that the durational residency requirement challenged herein cannot be justified on a rational basis; that it is invidiously discriminatory, and is thus unconstitutional. The district court further held that the dual residency requirements were nonseparable, and thus, without reaching the issue of the constitutionality of the

"admitted for permanent residence" requirement, declared both requirements invalid and unenforceable. We have argued in this brief that *both* residency requirements be declared unconstitutional. The holding and reasoning of the district court is not inconsistent with this argument. We thus, alternatively, urge this Court to affirm the district court decision on the grounds stated therein.

We have suggested, in this brief, yet a third alternative which would result in the affirmance of the district court decision. This Court may deem the class certified by the district court to be a class of aliens "admitted for permanent residence" within the meaning of the medical insurance program, as a matter of statutory construction. See this brief, *supra*, at Sec. II, pps. 38-43. By affirming the district court's holding declaring unconstitutional the durational residency requirement, and construing the certified class as above suggested, the need to determine either the question of separability or the issue of the constitutionality of the "admitted for permanent residence" requirement would be obviated.

We believe this Court can, with statutory and constitutional justification, affirm the district court's decision by any of three suggested routes. The primary theory underlaying all of these possible avenues to affirmance (with the exception of the nonseparability decision of the lower court) is that Appellant has offered no constitutional justification for the residency requirements challenged in this case. For this Court to accept Appellant's "plenary power theory" is to totally ignore, indeed discredit, Lord Acton's admonition, that "absolute power corrupts absolutely," for this is surely

the bottom line of Appellant's "plenary power" argument in favor of a rule without a reason. And thus, for good sound and constitutional reasons we urge this Court to affirm the district court's decision either, (1) by adopting the lower court's reasoning, or, (2) by declaring both residency requirements to be a denial of equal protection of the laws to aliens, or, (3) by construing the certified class as technically meeting the "admitted for permanent residence" requirement, while concurrently declaring the durational residency requirement unconstitutional.

Respectfully submitted,

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APPENDIX

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
1724 F STREET NW.
WASHINGTON, D.C. 20435

OCT 1 1974

Dear Mr. Feinberg:

Reference is made to your letter of September 16, 1974. A completely comprehensive answer is not possible because of the many variables with individual cases.

Generally, however, subsequent to the 1971 Amendments to the Selective Service Act, it would appear that Cuban parolees were and are required to register with the appropriate local board of the Selective Service System. As you correctly stated in your letter, Title 50 App. Section 453 of the United States Code requires every male person of a certain age residing in the United States to register. The exception to Section 453 pertains only to an alien "lawfully admitted to the United States as a nonimmigrant" under Section 101(a)(15) of the Immigration and Nationality Act, as amended, which section specifically denotes the classes of nonimmigrants exempt from registration. Cuban parolees as a class do not fall within the nonimmigrants designated under that section.

Therefore, under the present law Cuban parolees would be required to register and necessarily be subject to induction along with other eligible males. (At the present time no inductions are taking place since the induction authority under Section 17(c) of the Military Selective Service Act has expired).

Prior to the 1971 Amendment, only male aliens "admitted for permanent residence" could have been inducted into the military service. Title 8 Section 1182d(5) of the United States Code clearly states that parolees are not to be admitted for permanent residence. Thus, under the prior law, Cuban parolees were not subject to induction. However, they were required to register.

It is also interesting to note that under a 1966 Public Law (89-732) Cuban parolees could change their status from nonimmigrant upon application to the Attorney General. Therefore, the status of the "Cuban parolee" varied with the changes in the law. Consequently, each

case must be synthesised in order to determine the status of the individual.

If we can be of further assistance please advise.

Sincerely,

FOR THE DIRECTOR

/s/ Peter T. Straub
Peter T. Straub
General Counsel

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